The patentee should merit the benefit of the doubt in case of failure to use his invention, for there are many conceivable ways of explaining such conduct. Possibly he is waiting to perfect an improvement; may be occupied with another patent of more importance; or he may be without funds.

Whatever the particular circumstances may be, it is the duty of a court to apply clearly expressed rules. The unusual right of the patentee to protection is emphasized by his exceptional position under various acts. In selling his patent he is free from the restrictions of the Sherman Anti-Trust law and therefore may annex the most monopolistic conditions to his sale. *Victor Talking Machine Co. v. The Fair,* 123 Fed. 424. Not even misuse of his patent in some way negatives the presumption that he will serve the public, for he is allowed wide freedom. *Fuller v. Berger,* 120 Fed. 274. Certainly nonuse ought not ever to induce a court to act in contravention of so marked a policy.

THE PRESUMPTION OF UNDUE INFLUENCE IN WILL CASES.

The case of *Lockwood v. Lockwood,* decided by the Supreme Court of Errors of Connecticut, in March, 1908 (80 Conn. 513, 69 Atlantic 8), contains an unusually lucid exposition of the law as to the burden of proof in will cases and the nature of the presumption of undue influence, and a sound and convincing limitation of that presumption.

The rule of the burden of proof in contests as to the probate of a will is complicated, first, by the especial importance given to the subscribing witnesses by the law of wills, secondly, by the normal presumption of sanity, and thirdly, by exceptional presumption of undue influence.

The issues in the ordinary will contest are three: did the testator execute the will in the manner required by law, was he of sound and disposing mind and memory, was he induced to make the will by any fraud, duress or undue influence?

It is evident that, as to the first two of these issues, the burden of proof is upon the proponent of the will; the will cannot be probated until it has been shown to the court that the testator was competent to make a will, and that he did make it in the legal manner. But, the presumption that every man is sane until proof is given to the contrary would relieve the proponent of the necessity of opening the question of mental competency (as the State is relieved of proving the prisoner's sanity in a criminal prosecu-

tion), were it not for the peculiar importance given to the testimony of the subscribing witnesses, who must be called by the proponent, and whose testimony must support the will. If they testify satisfactorily to the execution of the will, and to the testator's competency, the will is supported by the evidence peculiarly relied upon by the law in will matters, and the proponent of the will may rest upon his *prima facie* case. And this required testimony must show the testator's mental competency, as well as his actual execution of the alleged will.

If the subscribing witnesses should deny, or should refuse to affirm, either the due execution of the will, or the testator's soundness of mind, the proponent would have failed to make out the technical *prima facie* case recognized by law, or he would have overthrown the presumption of sanity by the doubt cast upon it by his own witnesses, and it would therefore be necessary for him to support his case, discredited by the hostile evidence of the witnesses especially relied upon by the law, by the testimony of other satisfactory witnesses, before he could safely rest his case.

Even if he has, by the testimony of the subscribing witnesses, made out the legal *prima facie* case, he has shifted to his adversary only the duty of going forward with other testimony; the burden of proof, in its proper sense, still rests upon the proponent of the will as to due execution and mental competency, and at the conclusion of the trial, the court or jury, to sustain the will, must find that a fair preponderance of the evidence is in favor of the will upon those points.

Crowninshield v. Crowinshield, 2 Gray 524, *Thayer's Cases on Evidence,* 100.

As to the issue of undue influence, the burden of proof is upon the opponents of the will; the allegation of undue influence is regarded as one in confession and avoidance, and it is no more necessary for the proponent of the will to offer affirmative evidence of the freedom of the testator from such influence than it would be for one who sought to prove a deed to add to the proof of execution affirmative proof of the absence of fraud or duress.

But here comes in a presumption peculiar to the law of wills, thus stated in the Lockwood case. "In certain cases: where the natural object of the testator's bounty is excluded from participation in his estate, where a stranger supplants children, and the will is in favor of the lawyer drawing and advising as to its provisions, or the guardian having charge of his person and estate,

or of the person occupying a clearly analogous position of trust, there is imposed upon the proponents of the will the obligation of disproving by a clear preponderance of evidence the actual exercise of undue influence by such beneficiaries of the will."

Such facts, therefore, appearing on the face of the will itself, or disclosed by the evidence of the subscribing witnesses, create a presumption of undue influence which the proponents of the will must remove before they can claim to have made a *prima facie* case.

The leading case as to this presumption is *Barry v. Butlin, 2 Moore P. C.,* 480, *Thayer's Cases,* 82; and it has often been followed and applied in the American courts.

In the Lockwood case, it appeared that the testatrix was the mother of nine adult children, and that she gave to two of these much more than to the others; it also appeared that one of the favored daughters had been accustomed to attend to business matters for her mother, and to advise her, and that she went with her to the lawyer's office where the will was drawn. Other evidences was given to support and to overthrow the claim of undue influence. The trial judge was asked to charge the jury, and did charge them, that the above facts raised a presumption of undue influence, and that the burden was upon the proponents of the will to remove it by a preponderance of the evidence.

This the Supreme Court held to be erroneous, saying: "There is a broad distinction btween the effect of a confidential relation of a legatee to the testator, as suggestive of undue influence, when that legatee is a stranger and when he is a child. In the latter case, both the relation of confidence and some participation in the estate is natural. In *Dale's Appeal,* 57 Conn. 127, we say: 'It is the duty of a son to entitle himself to the confidence of his parents; it is his right to ask with earnestness, restrained within proper limits, for testamentary remembrance.' The language used in that case is applicable to the facts appearing in this."

The ruling in this case seems to be eminently sound. The jury are entitled in every case to have all the facts put before them as to the relations between the testator and the beneficiaries of the will; any evidence of undue influence, any abuse of confidence, they should give its full weight. But the spirit of the modern law of evidence does not favor and ought not to favor creating artificial rules as to the force of evidence, or confusing the minds of jurymen by instructing them to determine the preponderance

of the evidence in any other way than by the exercise of their best reason on all the facts of the case.

If a person of sound mind, in the presence of three witnesses, has executed according to law a will of his property, it ought not to be set aside by a jury unless all the facts have created a preponderant belief in their minds that the will was induced by fraud or undue influence; and any rule of law by which their judgment is to be controlled by a presumption defined by the court ought to be limited to cases clearly of a suspicious and reprehensible character.

E. P.

THE USE OF THE QUO WARRANTO.

The ordinary use of the information in the nature of quo warranto or its statutory substitute, for many of the states have statutes defining it, lies where a person has usurped an office, or franchise, or where once having held such office or franchise he has forfeited it by misuser or nonuser. *Leigh v. State,* 69 Ala., 261. This use of the writ is in every respect a survival of the common law functions which it performed.

In the month of July, 1908, the Supreme Court of Florida handed down an opinion in the suit of the *State of Florida ex rel, W. H. Ellis, Attorney General, v. Gustav Gerbing,* which is of very general interest, as involving the right of the public to take oysters in or on the shores of navigable waters below high water mark. Stated briefly it was a quo warranto proceeding in the Circuit Court by the Attorney General to ascertain by what warrant or authority the defendant had marked and staked off certain portions of the bed of a navigable river in a certain county in Florida, and claimed and usurped the exclusive right to the use, benefit and enjoyment of, natural or maternal oyster beds upon the designated land below high water mark and extending to the channel of said navigable river.

We venture to say that the use of quo warranto to try such a right is a peculiar if not doubtful procedure in this particular case. And it is more remarkable, upon consideration, that the court failed to challenge its use in this specific instance, and did not even allude to the point throughout its opinion.

We have learned that quo warranto lies to try the right to a franchise. In this case we believe it material to know the construction placed by courts upon the word "franchise." A very